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Filed April 9, 1900.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 238.

ROBERT S. LEOVY

versus

THE UNITED STATES OF AMERICA.

BRIEF FOR ROBERT S. LEOVY.

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Attorneys for Plaintiff.

Thomason, Print., 526 Natchez Street, N. O.

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The annexed brief, which was filed on application for writ of *certiorari* herein, having been previously used in the United States Circuit Court of Appeals for the Fifth Circuit, covers (with the slight additions hereinafter mentioned) the points now before this Honorable Court. The short "Addendum" to be found at the close of the brief contains some important suggestions drawn from Federal legislation since the trial.

We have also added a copy of a map made by the U. S. Coast Survey which we believe will aid in explaining the facts. We have traced upon it in ink the lower part of the bayou (Tonfine), possible commerce with the banks of which defendant is said to have obstructed. We have added this portion, as the bayou appears on the map itself as lost in the marshes. A copy of the map (without our additions) is in the transcript. Red Pass, which does appear on the map, had been closed by nature near the gulf, and had not been used for some years. This is shown by the uncontradicted testimony in the transcript.

UNITED STATES CIRCUIT COURT OF APPEALS

FIFTH CIRCUIT

No. 745.

ROBERT S. LEOVY, PLAINTIFF IN ERROR,

versus

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

STATEMENT.

In about the year 1836 the Mississippi River broke through its banks a few miles above Southwest Pass, at a point known as Gilbert's Canal. Thereafter, up to this time, its waters have, through this crevasse, overflowed the back country, and has made for itself through the marshes several small passes, known as Grand, Tiger, Williams, Spanish, and Red Passes; all, except Grand Pass, being tortuous and insignificant streams, extending from the river through a wide waste of sea marsh to the Gulf; some ten miles distant. At these outlets, even when the streams reach the Gulf, mud flats stretch for several miles, covered by about two feet of water at mean tide. These facts are shown by the United States charts on file.

The result of the annual overflow of the river has been the building up, by deposit of silt, of swamp lands where before was only a sea marsh. A description of these lands

and of the process by which they were made will be found in the testimony of Mr. E. L. Corthell, an expert of national reputation; and Eads' principal assistant in the construction of the Jetties, incorporated in the report of case of State vs. Buck et als., in 46 La. An. p. 673; a suit among claimants of this land which engendered bitter feelings, believed to be the foundation of the present suit. (Rec. p. 23).

In 1849 (9 Stat. at Large, p. 353), Congress granted to the State of Louisiana all the swamp land within the State, in an Act entitled "An Act to aid the State of Louisiana in draining the swamp land therein." The first paragraph of this Act reads: "To aid the State of Louisiana in constructing the necessary drains to redeem the swamp and overflowed land therein," the said swamp lands are hereby donated, etc. In 1850 similar grants were made to other States. And the United States Supreme Court has said that the grant of the lands was "to enable them to *construct the necessary levees and drains* to redeem them." (142 U. S. p. 185).

The State sold to many persons large tracts of this land, some of whom improved them at heavy expense, and others bought, with a view to extensive improvements.

The first step toward the drainage and redemption of these lands was the closing of Spanish Pass in the year 1888. This was done on the petition of property holders; no objection was made and a large tract of land was redeemed and improved. (Rec. pp. 47, 88, 99).

Red Pass remained open, and during high stages of water in the river, it was filled and its banks overflowed for several miles, not only preventing the drainage of that part of the land, but flooding the country for miles above it, *extending*

behind the levees built at great expense *and rendering them useless.* (Rec. pp. 79, 80, 82, 83, 101).

In 1890 some two hundred residents of the vicinity applied to the Police Jury to close this stream. The following is a copy of the resolution of the Police Jury passed in accordance with this petition:

"On motion of Mr. Schoenberger, duly seconded, that the syndic of the 5th ward be authorized to have Red Pass closed, provided property owners are favorable to the closing of said Pass and pay all costs on said work." (Rec. p. 118).

In 1895 Robert S. Leovy was syndic, the officer on whom was imposed the duty of carrying out this work when the property owners were prepared to pay for it. (Rec. p. 119). Finding the property owners both willing to pay the cost and anxious to have the work done, acting officially and under the authority vested in him by the Police Jury, the Pass was closed, as Spanish Pass adjoining it had been under precisely similar circumstances.

Red Pass was a shallow, narrow stream passing through the marsh for some ten miles, and finally emptying in the mud flats on the border of the Gulf, where the average depth was only two feet. One branch had been closed many years, and the few luggers that took oysters to the Gulf for planting or "bedding" always used a branch called Tonfine Pass, so small that on the government charts filed it appears *as lost in the marshes.* No commerce is shown anywhere to have passed over it; nor has it ever conveyed a passenger. Its sole use, and that extremely limited, was for the conveyance of small loads of oysters taken from one bed on one side of the river to be planted

on the other side. Two other streams may be used and were used for the identical purpose, Tiger Pass and Grand Pass, as shown by maps and the testimony. By their use the identical spots may be reached by a slightly lengthened journey. Tiger Pass being one mile distant and deeper and wider. No commerce is destroyed; and this transplanting of oysters may be carried on between precisely the same beds as before the erection of the levee complained of. See testimony of four witnesses, Rec. pp. 63, 71, 79, 94. In other words, these transactions are subjected, for the preservation of the health of the parish and the reclamation of its lands, and their protection from floods, to infinitely less inconvenience than real and important interstate commerce frequently undergoes through other branches of the State's police power, quarantine, inspection, etc.

As to commerce with the banks of the Red Pass, beyond the levee complained of, there is no suggestion that a boat had ever landed there.

These Passes, it must be borne in mind, were in no case natural rivers, but are the outflow of water from the river, through a crevasse left open for years because the condition of the lands, until filled by deposits, did not justify the expense.

In November, 1897, the Police Jury approved the action of their syndic and ratified his action. The following is the resolution (Rec. p. 119):

"Whereas, the Police Jury of the Parish of Plaquemines adopted a resolution on July 1st, 1890, authorizing and directing the closing of Red Pass, a part of the jump, an old crevasse of the Mississippi River, and pursuant thereto Robert S. Leovy, the syndic of the fifth ward of said parish,

did close the same, and the closing thereof has reclaimed large tracts of worthless sea marsh and made it valuable and taxable land, and, by drainage, has improved the health of the district and improved all the land near the Mississippi front; and

"Whereas, since the closing of said Red Pass great improvements have been made on the land adjoining the Pass and many orchards have been built up which will be damaged by the opening of Red Pass; and

"Whereas, the Levee Board of this district has made the new bank a part of the Levee District by resolution passed November 20th, 1897, and protested against the opening of Red Pass;

"*Be it Resolved*, That this Board hereby ratifies and approves the act of said Robert S. Leovy, Syndic, in closing said Red Pass, and unites with the Buras Levee Board in protesting against the opening thereof, and requests the Attorney of the Board to take such steps as in his judgment may be necessary to prevent said Pass from being opened."

The Levee Board adopted the levee thus made as *part of the Levee System* and joined it to the levee made by the State. (Rec. p. 82). They also passed a resolution substantially to the same effect as that just recited. (Rec. p. 8).

For this official action, taken upon a numerously signed petition, authorized and ratified by the only boards having the authority to protect their people from disastrous floods and carry out the purpose of the congressional grant, there being no shadow of any claim of malice or ill will in the official act, and there having been a unanimous decision of the State Supreme Court in favor of the power, and not the slightest protest at the time, Mr. R. S. Leovy, the syndic of his ward, was indicted nearly three years afterward; long after the old pass had presumably grown up in willows

and after part of the reclaimed swamps had become valuable young orchards and truck farms.

The area of land affected by the issues in this case extends to three whole townships, or about 100,000 acres of land. While this suit apparently covers only the question of the guilt of the defendant, it involves, therefore, questions of great importance. The main question is, whether the immense areas involved shall be kept worthless swamps in order that a few oystermen may be saved a slight deviation in their voyages from oyster bed to oyster bed; or whether the lands were rightfully made valuable, the expressed purpose of Congress rightfully carried out, the citizens of the Parish rightfully protected in their health and property from disastrous floods, by the exercise of the State's police power; a power never expressly mentioned in any Federal statute, but impliedly included in all.

ASSIGNMENT OF ERRORS.

Filed June 16, 1898.

United States Circuit Court, Eastern District of Louisiana.

The United States
vs. } No. 2245, C. D.
Augustus F. Leovy and Robert S. Leovy.

And now comes Robert S. Leovy, one of the defendants in this case, and makes and files with his petition for writ of error herein, the following assignments of error:

1st. Said Court erred in sustaining the objection made by the United States Attorney to the introduction in evidence upon the trial of this cause, the resolution adopted by the Board of Commissioners of the Buras Levee District, and in refusing to permit the same to be read in evidence, a copy of which is annexed to and made a part of this bill of exception No. 1.

2d. Said Court erred in refusing to instruct the jury,

as requested by this defendant, as follows, to-wit:—"That upon consideration of the whole evidence adduced upon the trial of the case, the Court direct the jury to acquit the defendants."

3d. Said Court erred in refusing to instruct the jury, as requested by said defendant, as follows, to-wit:—"If the jury shall find that Red Pass is not a natural stream, but simply the result of a crevasse, or outbreak of the Mississippi River from its natural channel, they must acquit the defendants."

4th. Said Court erred in refusing to instruct the jury, as requested by the defendants, as follows, to-wit:—"If the jury shall find that Red Pass was a crevasse, or outbreak, of the Mississippi River from its natural channel, the result of which was to overflow a large portion of Plaquemine Parish to the detriment of the inhabitants thereof, by the destruction of their property, and prejudicial to their health, the State, in the exercise of its police power, delegated to the Police Jury of the Parish of Plaquemine, had a right to close it."

5th. Said Court erred in refusing to instruct the jury, as requested by the defendant, as follows, to-wit:—"If the jury shall find that Red Pass is a crevasse, or outbreak, of the Mississippi River from its natural channel, and overflowed the lands situated on the banks of Red Pass, and that its closing was necessary to reclaim, drain, or levee said lands, or any of them, then it was the duty of the State, under the Acts of Congress of 1849 and 1850, to close Red Pass."

6th. Said Court erred in refusing to instruct the jury, as requested by the defendants, as follows, to-wit:—"Unless the jury shall be satisfied, from the evidence, that Red Pass was, at the time when it was closed, as alleged in the indictment, substantially useful to some purpose of interstate commerce, the jury are instructed that any Federal legislation, purporting to prohibit, or prevent, or interfere with the closing of said stream, would be beyond the powers granted to the Congress by Art. I, Sec. 9, of the Constitution, or otherwise vested by the Constitution of the United

States in Congress, and would be contrary to Amendment 10 of the Constitution of the United States. And the jury are instructed that the defendants claiming and being entitled to the protection of that Constitution must be acquitted."

7th. Said Court erred in refusing to instruct the jury, as requested by the defendants, as follows, to-wit:—"If the jury shall find that the dam constructed at the mouth of Red Pass, was constructed by authority of the Police Jury of the Parish of Plaquemine, and that the defendant, Robert S. Leovy, was an officer of said Parish, and, in constructing said dam, was acting as such under authority of the Police Jury thereof, they must acquit him."

8th. Said Court erred in giving the following instruction to the jury:—"I wish also to say, that the question whether, some 60 years ago, the Jump resulted from the enlargement of some canal which was then in existence, and has been contended here was a crevasse in that sense of the word, you are not to consider at all. As you have been appealed to in the argument to consider that this question involved the right of the State to close a gap in its levees, I say that you have nothing of that sort to consider. I repeat to you, that whether or not 60 years ago the Jump was formed in the manner in which it was contended it was is not a matter for your consideration."

9th. Said Court erred in instructing the jury as follows, to-wit:—"I charge, you gentlemen, that the Police Jury of the Parish had no right to authorize Mr. Robert S. Leovy to dam Red Pass, if Red Pass was a navigable water of the United States. I say that it had no authority, because in the year 1890, the Congress of the United States passed the law under which this indictment has been brought, forbidding the damming of any navigable stream of the United States, without the previous authorization of the Secretary of War. Therefore, as it was not contended in this case that there was any authority from the Secretary, but on the contrary, there is proof tending to show there was no such authority, then it results, that it is no defense for Mr. Robert S. Leovy to show his pretended or alleged

authority from the Police Jury of the Parish of Plaquemine. The Police Jury of the Parish of Plaquemine could not lawfully have dammed it, therefore Mr. Leovy could not."

10. Said Court erred in instructing the jury as follows, to-wit:—"What is a navigable water of the United States? It is a navigable water, which, either of itself, or in connection with other water, permits a continuous journey to another State. If a stream is navigable, and from that stream you can make a journey by water, by boat, by one of the principal methods used in ordinary commerce, to another State from the State in which you start on your journey, that is a navigable water of the United States. It is so called, in contradistinction to waters which arise and come to an end within the boundaries of the State. * * * But if from the water in one State you can travel by water continuously to another State, and the water is a navigable water, then it is a navigable stream of the United States. * * * If it was navigable and connected with waters that permitted a journey to another State, then it is a navigable water of the United States. In this case, if it was navigable, it would be a navigable water of the United States, or might be so in two ways; by connecting with the water of the Mississippi. I mean to say, that if there is evidence here, that you could leave the Mississippi and go into the Jump, and then go to the place where this dam was built by Robert S. Leovy, and some distance beyond that and that it was navigable for boats or vessels carrying on commerce, then it would be a navigable water of the United States, because it would connect with the Mississippi, you could go to the other States of the Union. I say again, that it might connect in another way. It might connect through the Gulf. But the fact that I wish to impress upon you is this, that it is not absolutely necessary that you should find that there was navigability all the way from the Jump out to the Gulf, because if from some point beyond the place, where Mr. Robert S. Leovy built this dam, towards the Mississippi River, the stream was navigable, then it would be a navigable stream of the United

States, because it would connect with the Mississippi River."

11th. Said court erred in rendering sentence and judgment herein against this defendant on the verdict of the jury herein, as the same is of record, because there was no penalty imposed by law for the offense charged in said indictment, of which this defendant was convicted.

Wherefore, by reason of the premises, and for the errors assigned, and others manifest upon the face of the record, said Robert S. Leovy prays that said judgment and sentence may be reversed and set aside, and that he be discharged from the premises, and go hence without day.

(Signed) H. J. LEOVY,
ROUSE & GRANT,
Attorneys for R. S. Leovy, Defendant.

EVIDENCE.

1. The map of the State, filed with the transcript, issued by the Commissioner of the State Land Office, shows the character and extent of the land drained by Red Pass. It also shows the other small, shallow streams running through the marshes. (R. p. 120).

2. The U. S. Coast Surveys. Two maps (pp. 117 and 118). These charts show Red Pass and its relation to Tiger and other shallow marsh streams. One of these maps shows the depth of water on the *mud flat* at the mouth of Red Pass, extending for about three miles from its end. That depth, as shown on the chart, is about two feet. The parol testimony must be taken with reference to these official charts. (R. p. 20). Especially is this true of the absurd statements of some of the witnesses as to the greater distance by way of Tiger Pass. The official charts show how great these overestimates were, and discredit all the testimony of plaintiff witnesses in question. The distance

between the two Passes is about one mile at their mouths. (R. pp. 63, 71, 89, 94).

3. The survey of the lands, made by Connelly in 1836, showing that at that time the bank of the river where the Jump afterwards broke through was intact; and that, consequently, the Jump, at the time of the donation of the lands by the U. S. Government, for leveeing and drainage, was a recent crevasse. (R. p. 120). (These maps are filed with the papers).

4. Field notes of the said Connelly, showing that what is now the Jump was at that time a mere artificial opening for skiffs, a few feet wide. (R. p. 131).

5. Appointment of R. S. Leovy Syndic of the ward. (R. pp. 119, 81).

6. Resolution of the Police Jury of the Parish authorizing the syndic to close Red Pass. (R. p. 118).

7. Resolution of the Police Jury ratifying the act of R. S. Leovy, Syndic of the District, in closing Red Pass. (R. p. 119).

8. Resolutions of the Levee Board ratifying and affirming the resolutions of the Police Jury, and the act of R. S. Leovy. (R. p. 13). Exception to this document was sustained by the Court and bill reserved. (R. p. 8).

9. The levee placed across Red Pass is made part of the general levee system of Louisiana by the Levee Board. Testimony of Shoenberger, President. (R. p. 82).

10. Land Department map of Louisiana.

PAROL TESTIMONY.

1. As to the property affected by the floods from Red Pass.

The map of Louisiana, issued by the Commissioner of the Land Department, shows the character of the lands affected by the floods from Red Pass. It was swamp land and impassable sea marsh from the river to the Gulf. The testimony of Shoenberger, President of the Police Jury and of the Levee Board (R. p. 77), of Mr. Lewis, of the State Board of Engineers (R. p. 44), of Mr. Theodore Wilkinson, Ex.-President of Levee Board (R. p. 98), and of DeArmas, Inspector of the Levees (R. p. 56), shows the emergency in the district. The testimony shows conclusively that if Red Pass be now opened it will, by inundation and by closing the drainage, ruin the most valuable lands and farms in the State. *It will also prevent all future improvement of this whole district.* This testimony is of the very highest character and is uncontradicted by a single witness. We invite attention to the whole testimony of Mr. Shoenberger (R. pp. 79, 83), Lewis (R. p. 48), Wilkinson (R. p. 101). We quote the following from the testimony of Mr. Shoenberger, President of the Levee Board (R. p. 83):

"Well, we have got it drained for 15 miles on the river, giving us splendid drainage. The property in the 5th ward, before those two passes were shut was valued at about $5000; to-day it is valued at $100,000, and if the passes are not opened for five years more it will be three times as much. *If the pass is opened again, it will be all ruined.*

"Q. Are the people of the Parish making any opposition to the closing of this Pass? A. No, sir, only the fishermen. Q. Have there been any improvements made at the jump in building up orange orchards? A. Yes, sir. Q. Have you planted your orchard any further back from the Mississippi since this pass was closed up? A. Yes, sir, I think you can plant it to twice the depth. Q. You have stated these lands are very valuable, these orange orchards; state to the jury why these lands are so very valuable? A.

Well, if a man attends to an orchard, it brings him an income; I have two arpents front a mile below and I was offered $6000 for them; but this year it will bring me $3000 *earnings;* it is two arpents front and three deep. Q. That is, six arpents? A. Yes, sir. Q. You netted $6000 on them? A. I could sell the land to Mr. Socola, but it will bring me in an income of $3000 to $6000 regularly." (R. p. 83).

Mr. Lewis said on this subject:

"Q. From Buras down to the Jump, what is the character of the country along the Mississippi River? A. Well, I judge for about six acres inward, on an average, it is a fine country for orchards, *the finest in the State.* Q. That goes down to the Jump? A. Right down to the Jump." (R. p. 48).

He also added:

"From Fort Jackson down it would be to the interest of the people who have property in that neighborhood, to have the Red Pass and all the outlets down there closed; that is what *they need for proper drainage.*"

And on page 49:

"They are valuable, principally for orange and fruit culture, especially orange culture. There are some orange orchards, I do not know how many of them, but there are many valuable orange orchards below Fort Jackson since the building of the levee, in 1888, and previous to that there was nothing but a palmetto swamp and grazing lands. * * From Buras to Fort Jackson it is five miles, and then there are three miles of very fine orchards below; there would have been a great deal more if there was better drainage."

And he states (on p. 48) that the closing of Red Pass not only prevents overflow, but drains the country all around.

2. As to the character of the Pass.

The Jump Pass and its subdivisions (including Red

Pass) are simply a crevasse, similar in all respects to numerous crevasses closed by this and other States for protection against floods. It was not closed earlier because, prior to about 1880, the river was not leveed, and it would have been idle to place levees across these crevasses. The breaking through the river bank at Gilbert's Canal was a recent crevasse at the time of the donation of the lands by Congress, for the express purpose of leveeing and draining the swamp lands, and for that purpose there was no limit of time in the grant. The country above Red Pass is now leveed by the State, and the levee now in controversy is now part of the system.

We ask attention to the testimony of Sidney Lewis, State Engineer (p. 46), and of Mr. Shoenberger, President of the Parish Levee Board (p. 78), and of Mr. Theodore Wilkinson, ex-President (p. 100), as to this matter of State action in closing crevasses.

Mr. Lewis repeats several times that the Jump was not a natural stream, but simply a crevasse like those which the Levee Board often closed. Mr. Schoenberger says the same thing and enumerates several similar crevasses his Board had closed. Mr. Wilkinson said (p. 100) that the Jump was not in the nature of an ordinary stream, but "only a crevasse, a break in the banks of the river, in which the water broke through and carried deposits of land which filled up here and there and *left a number of shifting channels to the sea;* by the water flowing through deposits, and that it was thus the building up of the land that made the passes. Spanish Pass was stopped up by the State Engineers and nobody ever made an objection to it; on the contrary, the whole community hailed it with delight."

Asked what would be the effect on the prosperity of the State if it were without power to close crevasses, he said (p. 101) that "it would be uninhabitable." Asked if a levee were constructed on the river bank and a pass like Red Pass left open, permitting the water to get behind the levees, what the effect would be, he said, "I would answer that by saying it would be useless. It would be impaired, if not wholly destroyed." (R. p. 101).

3. Not only was Red Pass a mere crevasse and not a natural stream, in the sense of the statute and as construed by the States from time immemorial, but neither by size nor importance was it entitled to the designation of a navigable stream. The question as to what is a navigable stream is one of law and fact. We now ask attention to the question of fact.

In reviewing the evidence on this point, we beg to suggest that much labor will be saved by consulting the coast surveys and the land office map of Louisiana rather than the parol testimony, with respect to the location of the Passes and the character of the country surrounding them. It will then be seen that the opening from the river is quite a broad stream which is called the "Jump;" and that about a half mile from the Jump is a branch of it called Red Pass; and at about a mile from the head of Red Pass is Tonfine Pass (not even named on the U. S. Coast Surveys, and by them ending in the sea marsh some distance from the Gulf).

Three things the evidence shows, which accord moreover with the evidence of Corthell, the expert, to be found in 46th An. 673 (offered in evidence by the Government): First, that for many years all these Passes have been stead-

ily growing shallower and narrower, so that at the time of the closing Red Pass few of the smallest crafts attempted to pass through it. (R. pp. 53, 70, 94). Second. That Red Pass itself had closed entirely some distance from the Gulf, and all the small oyster boats that passed through were compelled to use Tonfine Pass. Third. That, though in some places there is deep water, both Red Pass and Tonfine Pass became narrower and shallower and emptied into mud flats at some distance from the Gulf. At their mouths and for three miles out, according to no standard fixed by the courts, is the water navigable.

It would occupy too much space in this brief to sift the testimony of the witnesses. We think that, on the whole, the Court will see that according to the legal definitions, to which we shall refer, Red Pass was not a navigable stream. Such streams abound in the whole of Southern Louisiana and meander in every direction through vast tracts of the swamp land donated by the Government for drainage and reclamation.

One point is made entirely clear by the evidence, and that is, that absolutely no commerce was ever carried on with the banks of Red Pass, which were, *at the time*, an uninhabited swamp; and it is further clear that no commerce, in any legal or reasonable sense, was ever carried on through the Pass to points beyond it; while it is shown by all the testimony that much of the land can be, and has been made valuable, by drainage, for habitation, and the growth of fruits and other agricultural products; the country thus becoming much more useful in the production of commerce than if occasionally used by small boats for the carrying of oysters for planting purposes; especially when

it is remembered that the result of the damming is not a destruction of the means of transit, but a slight inconvenience. *It is not shown that a single passenger ever was carried through Red Pass; nor a single load of freight destined to any other State than Louisiana, nor indeed a single load destined for any market in Louisiana.* The luggers when loaded with oysters for sale always took other channels. They could not come through Red or Tonfine Pass. (Blaise, pp. 71, 72, 73, 76; Buras, pp. 89, 90, 93; Gibbs, p. 95). The sole use was for carrying in small luggers of oysters from one oyster bed to another (R. pp. 73, 89, 91); a business that can hardly be considered commerce; and it is difficult to understand how, originating and ending in the same State and relating solely to the transplanting of oysters within the State (an industry entirely, as is well settled, under the absolute control of the State), this oyster planting can be considered interstate commerce.

It will also be borne in mind, that even this oyster planting business can be, and has been carried on equally as well through Tiger Pass. The testimony of many witnesses for the defense shows that Tiger Pass is at its mouth only one mile distant from Red Pass, and is as deep and wide. (Record, pp. 63, 71, 89, 94).

Special attention is asked to the testimony relative to the depth of water at and beyond the mouths of Red Pass and Tonfine Pass. Nearly all the witnesses for the Government were oystermen. Their testimony is contradictory in most respects, but shows that Red Pass proper was closed years ago; that Tonfine Pass (a branch of Red Pass) was used in its stead; that sometimes the water at the bar was very low, and that even skiffs had to wait for the Gulf tide;

and that at most there was only about three feet of water over the mud flats. On the other hand, De Armas, the Levee Inspector, who was born and lived all his life near the Pass, testified that there was only a few inches of water on the bar, increased one or two feet at high tide (R. p. 57 *et seq.*) Oxford, the pilot, testified as to ten or twelve inches; that the greatest depth was eighteen inches (R. p. 67). Blaise, who lived near the Jump twenty-eight years, speaks of only four inches at low tide (R. p. 72). Buras, who lived near the Jump, who is a luggerman, swears that when he was in Tonfine Pass last (*six weeks before the closing*) the depth was hardly four inches (R. p. 87); and that the Pass was only from 25 to 30 feet wide (R. p. 93). Gibbs, an oysterman, says he passed five times with a boat drawing 18 inches, and had great trouble to get over the flats every time (R. pp. 94, 95). Stoulich, trapper and fisherman, lived near the Jump five years. The last time he passed through Tonfine Pass, five years before the closing, the flats were nearly dry; not more than four inches of water outside the bar. The deepest water was a foot and a half (R. p. 103). He says that in some places the width of the Pass was about fifteen or twenty feet, from bank to bank. It may have been wider (R. pp. 107, 108).

Taking all this testimony of disinterested witnesses together with the official maps and the character and limited use of this crevasse branch, we think that there can be no doubt that in no sense was Red (or Tonfine) Pass a navigable stream of the United States.

ARGUMENT.

1st. As to the assignment of error No. 1. Defendant

offered in evidence a resolution of the Levee Board showing that the closing of Red Pass had drained and redeemed land and protesting against the opening of the Pass because of the disastrous results that would ensue. The only objection was its irrelevancy. We contend that as the Pass was closed to prevent overflow of the land, that the evidence is relevant. (See Rec. pp. 8, 13).

2d. Under the second assignment. The whole evidence shows that the defendant was not guilty.

3d. Under the third and eighth assignments:

The Act under which defendant was indicted, referring to "navigable waters of the United States," clearly relates to natural and permanent streams and not to those caused by the breaking of river banks or levees. The action of all the States bordering on navigable streams from time immemorial and the construction placed on their police power in such matters and the necessity of preventing disastrous consequences to life and property, conclusively show that the narrow construction placed by the Circuit Court on the words of the Statute is unwarranted by experience or precedent. The testimony of the three experts in the case, Lewis, the State Engineer, Shoenberger, the President of the Levee Board, and Wilkinson, for many years President of the Levee Board, shows that before and since the passage of the Act of 1890 the State authorities have not hesitated to close crevasses when necessary, without regard to their depth. Mr. Wilkinson said, as we have seen, that if the State had not the power to close crevasses "it would be uninhabitable," "the statement would be preposterous that they had not the power to close it." (R. p. 101). His Honor, the ~~Circuit~~ Judge,

said, in substance, that if a stream caused by a crevasse from an interstate river, extended back two or three miles, and was navigable to that extent, it was a navigable stream of the United States within the meaning of the Statute. This definition would include very many crevasses, because the water from many of them is deep, and, if not closed at once, they remain deep for some time. We discuss the subject further under the head of the police powers of the State.

That Red Pass was created by a crevasse is proved beyond doubt. It was a recent crevasse when the lands were donated by Congress to be leveed; and the double power to close it has remained in abeyance for so many years because no interest required that it should be closed, and the lands were not yet greatly improved in its vicinity prior to the year 1890.

Under the Fourth, Seventh and Ninth Assignments of Error:

The error, of which we here complain, is one of extreme importance. It involves the question of the reserved power of the State to protect itself from damage to property, health and life. It has been the subject of discussion ever since the foundation of the Government. There has never been a question as to the *existence* of the power; but concerning the legality of particular acts done in exercise of that power many decisions have been written.

The charge complained of, we submit, with all due respect to the Circuit Judge, goes farther than any decision of which we have any knowledge. It utterly ignores the existence of any police power whatever, where not found (and it is never so found) expressly excepted in the words

of Federal Statutes. It denies the existence of any power in the State, through any instrumentality, whether it be the Governor, authorized by Legislative Act, or the humbler municipal corporations, to dam outbreaks of a river, though such crevasse may carry destruction to the property, health and lives of the people confiding in the protection of these authorities. And the Court apparently deemed this great power destroyed or non-existent because, like quarantine, license and many other branches of the police power, it was not expressly referred to in the statute.

It is proved by the testimony, that the closing of Red Pass was done to drain and reclaim vast tracts of sea marsh donated to the State for that purpose; to prevent inundations in times of high water; and to prevent disease resulting from the existence of vast malarial marshes in the immediate vicinity of an inhabited district. It was shown that this was done by authority of the Police Jury, invested by law with the power; and that this action was subsequently approved by both the Police Jury and the Levee Board. The Levee Board adopted the levee thus made across Red Pass as a part of the general levee system of the State. (R. p. 82). All this action on the part of the State authorities was not only under the ordinary police power, but in pursuance of the terms of the congressional grant.

The reserved "police power" of the State is well defined in the early case of Tharp vs. Rutland R. R. Co. (27 Vermont 149). "It extends to the protection of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the State." This definition is adopted by the U. S. Supreme Court in R. R. Co. vs.

Husen, 95 U. S., p. 471, and in 16 Wallace, p. 62, and by Judge Cooley, in his work on "Constitutional Limitations." (P. 715). That this police power was originally reserved by the States, and is essential to their protection, has been frequently decided by the highest authority. In the case above referred to (95 U. S., p. 471) the Court said:

"We admit that the deposit in Congress of the power to regulate foreign commerce and commerce among the States was not a surrender of that which may be properly denominated police power."

"While for the purpose of self-protection it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the States *beyond what is absolutely necessary for its self-protection.*"

Surely the right to close crevasses, denied by the Court *a qua*, to prevent the inundation of the country and protect the property, health, and sometimes life of the people, must come within the exception stated.

In both the cases of Henderson vs. N. Y., 92 U. S., p. 259, and Lung vs. Freeman, 92 U. S. p. 275, the decisions were based, not on the non-existence of the police power, but on the fact that the acts in question transcended that power and "went beyond their professed purpose." "The police power of a State cannot obstruct foreign commerce beyond *the necessity for its exercise*" is the language of the opinion in R. R. Co. vs. Husen, 95 U. S. pp. 472, 473. (Italics ours).

Judge Cooley, in his work on Constitutional Limitations, adopts, as we have seen, the definition of the Police Power, as laid down in the Vermont case, and adds:

"In the American constitutional system, the police power has been left with the individual States and cannot be

taken from them, either wholly or in part, and exercised under legislation by Congress." (Page 715).

The case of Lawton vs. Steele, 152 U. S. p. 133 (decided in 1893), decides two issues in this case. It declares that Lake Ontario "is unquestionably within the jurisdiction of the State of New York," and it also declares that the police power is "universally conceded to include everything essential to the public safety, health and morals." (P. 136).

"The State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the Legislature, not only what the public interest requires, but what measures are necessary for the protection of such interests." For support of its opinion the Court refers to Barbier vs. Connelly, 113 U. S. p. 27, which is directly in point, not only because it supports our contention as to the doctrine of police power, but in its *application to the draining of sea marshes.*

The Court said:

"Neither the Fourteenth Amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed its 'police power,' to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character having those objects in view, *must* often be had in certain districts, *such as for draining marshes* and irrigating arid plains." (Italics ours).

No case could be more applicable to any issue of law than that of Withers vs. Buckley (20 Howard, p. 87). In that case the Legislature of Mississippi, for reasons stated in the decision, closed "Old River," which had long been used for navigation. Its action was attacked on the ground that it violated an Act of Congress. Among other things

the Court said (p. 92): "The Act of Congress of March 1st, 1817, in prescribing the free navigation of the Mississippi and navigable waters flowing into this river, could not have been designed to inhibit the power, *inseparable from every sovereign or efficient government*, to devise and to execute measures for the improvement of the State, although such measures might induce or render necessary changes in the channels or courses of rivers within the interior of the State, etc."

And again (on p. 93):

"*It cannot be imputed to Congress* that they ever designed to forbid, or to withhold from the State of Mississippi, the power of improving the interior of that State, by means either of roads or canals, or *or by regulating the rivers within its territorial limits, although a plan of improvement to be adopted might embrace or affect the course or the flow of rivers situated within the interior of the Sta'e.* Could such an intention be ascribed to Congress, the right to enforce it may be confidently denied." (Italics ours).

We do not think this Court will find it necessary in this case to decide the much contested question as to what would happen in case of direct and irreconcilable conflict between the national legislation and the police power. There is nothing in the Act of Congress covering this case which could bring about such an unfortunate situation. The contention that the mere fact that its terms are general, and make no express exception of acts done under the police power is conclusive upon the point, would, if correct, have saved the United States Supreme Court the labor of considering many of the most important problems ever solved by that tribunal. Little would have been said in quarantine, inspection, drainage, and a dozen other cases, if the Court had been concluded by the fact that, in Federal laws relating to interstate commerce, the mails, etc.,

there cannot be found exceptions as to the State's police acts. Nor will this Court, we submit, lightly conclude that Congress meant to limit and control, by mere inference from general terms, the exercise of the great and ancient power to construct levees; a power which has been always exercised by this and other States similarly situated; a *power absolutely necessary to its protection;* concerning which Mr. Wilkinson fitly said that its absence "would render the State uninhabitable."

The object of the Act was, in general, not entirely unlike that of Federal statutes relating to commerce by land. It was, to take under the control of the Federal Government the erection of structures in and over navigable streams, and making changes in their channels, for purposes of interstate commerce; and to prohibit individual interference with their usefulness; just as other Federal statutes take charge of interstate commerce by land, and regulate rates and charges, and prohibit conspiracies and combinations interfering therewith; just as still other statutes take charge of the mails and prohibit their obstruction. In none of these statutes is express exception made of the quarantine, inspection, levee or other police acts of the State.

In a few of the decisions the power of Congress has been said to be supreme in cases of unmistakable conflict. In others, as in Withers vs. Buckley, 20 Howard, 93, the U. S. Supreme Court said that the power of Congress to take away the police power of a State "may be confidently denied." But in nearly all the cases the Supreme Court has found a way out of the supposed dilemma by assuming that Congress has not designed to deprive the State of what is es-

sential for its protection. Indeed, in order that a conflict actually exist, the Court must find, first, that the action was one necessary for the well-being of the people; otherwise, it would not fall within the police power; and it must then find that Congress intended to prohibit such action. It is manifest that such cases can rarely exist; nor do we know of a case where it has been held that the conflict did actually exist.

This brief would be extended beyond reasonable limits were we to cite in support of our contentions the numerous decisions easily found in any digest. We cite only a few of the most directly applicable. The Court will bear in mind that in this case we have not only the exercise of police power under ordinary circumstances, but under also an express U. S. Statute authorizing the leveeing and drainage of these swamp lands. (See 142 U. S. 185).

1. The theory that the absence of an express exception of State police power concludes the matter and that police acts must be held to be included within the general terms of the prohibition, cannot, we submit, bear the slightest examination. We feel justified in so referring to this theory for the reason that Mr. Justice Fields, voicing the unanimous expression of the United States Supreme Court (in ~~Mulligan vs. Corbin~~, 7th Wallace, p. 485), used equally emphatic language with relation to it. In that case there was a Federal Statute prohibiting, in general terms, without any exception, all obstructions and retardations of mail carriers. The State officer indicted, exercising his police powers, not only retarded a mail carrier, but put him in prison. Yet the United States Supreme Court unanimously upheld his action, saying, "All laws should receive

a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence." And as against the theory that general terms in such statutes are not susceptible of construction, but are determinative as against the police power, we refer, generally, to all the decisions of the U. S. Supreme Court in cases of quarantine and inspection laws. We know of no case where the mere existence of general prohibitive terms in a Federal statute has been held conclusive, except in the charge to the jury in this case. The true rule of construction is the determination by the circumstances of each case as it arises. See 114 U. S. 622; 140 U. S. 545, 554; 127 U. S. 678, 686; 97 U. S. 505.

2. Aside from the reluctance of the courts in this particular class of cases to infer an intention by Congress to control the exercise of the police power, it is a general canon of construction that well-known subjects of great importance are not included in general terms. We refer to Witham vs. City of New Orleans, 22 Sou. Rep. p. 38, where municipal officers are held not included in a State statute prohibiting the dumping of garbage in rivers; and to 42 Fed. Rep. 448, where it was held (in accordance with the well-known decision of the Commission) that the Interstate Commerce Act did not, under the term "carriers," mean to include express companies.

3. As against the theory that by this Act Congress meant to assume control of the policing of the rivers, by levees, etc., we call attention to the notorious fact that Congress has not assumed exclusively, or even generally, the duty of preventing floods; and that, on this assumption,

the State of Mississippi has lately submitted to a vote a proposed amendment to its Constitution. We call attention, further, to the tremendous labors that would be cast upon the Secretary of War under this construction of approving all levees in advance; and to the *delay thus resulting in closing crevasses;* and, on the other hand, to the dangers under which State officers would labor if they acted without his authorization.

4. We draw attention to the fact, that the levee branch of the police power comes under the language of the decisions in reference to cases where there has been no express legislation on a particular subject. The mere general words in the navigation statute do not fill this deficiency. Such general words exist in the statutes relating to interstate commerce, and to the mails; yet, it is generally conceded, that a special statute on the subject of quarantines is necessary to prevent interruptions by quarantine authorities.

5. The subject of levees is one of such importance that it is difficult fully to state it without danger of seeming to exaggerate. Many pages of State Statute books are occupied by Acts devoted to levees alone. They have *quasi* municipal corporations created, and collecting large revenues for their express benefit. They occupy a separate chapter in every Digest. Millions of dollars are annually spent on them. Yet, we are told, that they are meant to be included in a mere list of general words specific enough to mention "dolphins," but not specific enough to mention levees or any similar word; although, in Section 10 of the very same Statute, which concerns the much less important Federal levees, an amendment incorporating the word was made by a special act.

6. Nor, we submit, does the act in question amount to such a total destruction of commerce as to fall outside of the decisions permitting reasonable regulation and reasonable interference. The deviation of a mile forced upon the few oyster planters passing through this marsh stream is a much slighter interference with commerce than the frequent actions of local Boards of Health, tying up trans-continental commerce for months; stopping mails and disorganizing the postal service; holding a foreign steamer for days at the mouth of the Mississippi; and prohibiting, in many Southern ports, for entire seasons, all intercourse with many important foreign ports. Yet slight as was the enforced deviation in this case, it was not for that that the Police Jury was condemned. The charge of the Court was to the effect that the question of whether the crevasse stream was navigable through its mouth might be disregarded. It was because there was a physical possibility of commerce by water between the untrodden swamps lying below the levee, and States far distant, that the levee was held illegal. We respectfully submit that this construction does not follow the rule above quoted by us, that: "General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence."

We ask the Court to decide that (as was said of the Fourteenth and other Amendments, 133 U. S. 31; 140 U. S. 555) this Act was not designed to interfere with the power of the State to promote the peace, morals, education and good order of the people; and that from the very nature of the case State legislation of a special character having these objects in view must often be had in certain

districts "as for draining marshes;" that (as was said in Bowman vs. Ry. Co., 125 U. S. 465) cases of alleged conflict between the power of the States and the letter of Federal Statutes "must be determined according to the circumstances of each particular case." We need hardly refer to the infinitely more important interference with commerce in the case of [illegible] (See Red. Rep. p. 674) or in many cases of [illegible], etc. We think that, without referring to particular precedents, this Court will have little difficulty in concluding that it was a reasonable exercise of the police power of the State of Louisiana to close this old crevasse, even though its closing might theoretically interfere with a physically possible but practically non-existent and practically impossible commerce by water with the untrodden sea marsh forming its banks. Levees cannot, we submit, be torn down and orchards and gardens reconverted into pestilential swamps; parishes flooded, and their inhabitants reduced to poverty upon this forced construction, new to the experts who have testified and condemned by the United States Supreme Court. We respectfully refer to the old decision, cited in 7 Wallace, p. 785, that in spite of a statute against breaking jail, a prisoner "need not stay to be burned in order that he may be hanged." We submit, that the people of Plaquemines Parish need not stay to be drowned in order that they may more conveniently be reached by oyster boats.

The decisions of the State Supreme Court show that the power to regulate these small streams and bayous which run through every part of the State has been recognized for many years as necessary for redeeming large and valuable tracts of land. The case of Boylan vs. Shaffer (13 An. p.

131) is one of these. The Court said, in that case: "Were the mere fact that steamboat or flatboat had been a short distance up a stream or bayou in high water a sufficient ground for declaring it a navigable stream, every slight depression on the banks of the Mississippi would then become a navigable stream and should be opened for the benefit of rafts and boats and the convenience of a few persons, to the total destruction of the planting interests on the banks of the River. It is well known that the State has, for a number of years, been *closing the small bayous making out of the principal rivers and bayous, and thus redeeming large and valuable tracts of land.*" (Italics ours).

In the case of Egan vs. Hart (Judge Parlange being the organ of the Court, 45 An. p. 1358), it is said that the action of the Legislature would have been futile indeed if it had charged the "State Engineers with the great duty of protecting the alluvial part of the State from overflow but had taken from them the power to build levees across the bayous and sloughs." The Act of 1886 assumed, "as a matter of course, that the Board of State Engineers has this power." And the Court quotes a statute which authorizes the closing of bayous, etc.: "Besides, the bayou is wholly within the State and the State authority over it is complete." (This bayou emptied into Red River).

It will be borne in mind that at the time Red Pass was closed this was the adjudicated law of the State; and, for acting under it, the defendant has been found guilty and fined. In the case now before the Court, the Judge charged the jury that Red Pass, even if not navigable through to the Gulf was, if navigable, a stream of the United States, and not a stream wholly within the State. The case of Egan vs. Hart was reviewed by the United States Supreme Court. (165 U. S. p. 188). But the U. S. Supreme Court

held, that as it had been decided as a matter of fact that the bayou above the bar was not navigable, it need not discuss the questions of law. Both in this case and in that of Lake Shore vs. Michigan R. R., 165 U. S. p. 368, the U. S. Supreme Court expressly refused to decide whether the Act applied to streams passing through only one State, even if forming a chain with interstate streams; and in the latter case it is possible to surmise from the language of that Court that it leaned against such construction.

Assignment of Errors, No. 6:

We asked the Court, in substance, to instruct the jury that if Red Pass, when closed, was not substantially useful to some purpose of interstate commerce, Federal legislation on the subject was "beyond the power of Congress," referring to Article 1, Section 9, and Amendment 10 of the United States Constitution. As the Statute of 1890 was based on the power of Congress to regulate commerce among the States, it would seem clear that the soundness of the proposition was indisputable.

The Statute provides penalties for obstructing navigable waters of the United States. What is a navigable stream is a question of law and fact. As a question of fact we think the evidence is conclusive, that at the time of closing Red Pass, that stream was in no legal sense a navigable stream, useful for purposes of commerce.

The highest courts have defined the meaning of "navigable streams." A concise digest will be found in 16th Am. & Eng. Encyclopedia of Law, at page 241. It is there said that "in order that waters may be navigable in the legal sense, *commerce must be carried on over them which is of an essentially valuable character.*" Many decisions sup-

porting this definition are referred to in the foot note. Now, the evidence shows that no commerce whatever was carried on on Red Pass at the time when it was closed, nor was there any intercourse with other States that could be claimed as commerce in any sense whatever. The definition asked in the charge substantially corresponds to that quoted above, and we submit that it is elementary that if the defendant was protected by the United States Constitution (as he clearly was) from punishment for damming any stream not falling under the constitutional powers of Congress, and there being evidence to show that Red Pass was not such a stream, he was clearly entitled to have his constitutional protection stated to the jury. Without such charge, the jury was clearly not advised as to the fundamental law governing the case.

Assignment of Error No. 10:

We contend that Red Pass was essentially a stream wholly within the State and wholly within the jurisdiction of the State.

The main case relied on to establish the contrary is that of The Daniel Ball, 10 Wallace, p. 557, decided in 1870. But a close examination of the case does not bear out this construction. The case was one applying to a statute relative to licensing vessels, and it was decided that goods shipped in a vessel in Michigan and marked for another State were covered by the terms relating to commerce between the State, and were subject to the control of Congress, that a vessel receiving freight in one State destined for another State was an instrument of commerce, subject to the license laws of the United States. The case of The Montillo, decided at the same time (11 Wallace,

413), was based on the decision in the Daniel Ball case, and on the same point, as to licensing vessels.

The later decisions have been clearer as to the control of the State over streams wholly within the State, although connecting with others extending beyond it. We have seen that in the case of Egan vs. Hart, 44 An. p. 7, it was so decided by the Supreme Court of Louisiana. That case was appealed to the U. S. Supreme Court. The Court stated, but found it unnecessary to decide the point. And in another case in which the same point was raised, found in the same volume, that of Lake Shore R. R. Co. vs. Ohio, 165 U. S. p. 365, the Court again declined to decide the point, and the tenor of its language seems to be rather against the doctrine stated in the charge in this case. These very late cases certainly show that the U. S. Supreme Court by no means considered the doctrine settled.

In the case of Lawton vs. Steele, 152 U. S. 135, which was a case relating to the waters of Lake Ontario, decided in 1893, the Court said, "All the waters referred to in the Act are unquestionably within the jurisdiction of the State of New York, there can be no valid objection to a law regulating fisheries, etc." The ground stated was that such legislation was within the police power of the State.

And in the case to which we have before referred (20 Howard, p. 93), the Court decided that Old River flowing into the Mississippi River was a stream within the State subject to the control of the State.

Assignment of Errors No. 7 and No. 11:

The Police Jury of the Parish of Plaquemine having authorized and directed the closing of Red Pass, and

Mr. Leovy acting in the premises under that authority, as one of the officers of the parish, the act was not his act, but the act of the political corporation whose agent he was.

Section 10 of the Act of September 19, 1890, 26 Statutes, 454, declares that:

"Every person and every *corporation*, which shall be guilty of creating and continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the Court."

It will be observed, that this Act provides for the punishment of corporations, as well as individuals, who shall be guilty of violating its provisions; that because, apparently, of the impossibility of imprisoning it, a corporation, if it shall commit the offense, shall be subject only to punishment by fine, while an individual may be subjected to fine or imprisonment, or both. The intention of Congress is manifest from the language used, to impose a penalty upon the corporation, when the prohibited act is one for which it is responsible, and not to impose it on any officer of the corporation. If this be the correct construction of the act, it necessarily follows, that the plaintiff in error was not liable to any penalty for his action in the premises.

This discrimination in the matter of punishment in favor of corporations, subjecting them only to a fine, while individuals are subject not only to a fine, but to imprisonment also, is probably without a parallel in legislation, and violates that spirit of equality before the law, which our form

of government and the Constitution guarantees to all men.

"It is our boast that we live under a government of law and not of men; but this can hardly be deemed a blessing, unless these laws have for their immovable basis the great principles of constitutional equality." Lewis vs. Webb, 3 Greenl. 326.

Those who make the laws "are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at the plow." Lock on Civil Government, Sec. 142.

Cooley says:

"This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments." Constitutional Limitations, 392.

By the Act of July 13, 1892 (27 Statutes, 110), Section 7 of the River and Harbor Act of September 19, 1890, was amended and re-enacted, and it was under this section that the plaintiff in error was prosecuted. This was a repeal of that section of the Act of September 19, 1890.

The language of the repealing Act is as follows: "That Section 7 of the River and Harbor Act of September 19, 1890, be amended and re-enacted, so as to read as follows:" Sec. 7, etc.

The language manifests the intention of Congress to substitute a new provision of law in place of the one dealt with, and the new provision covered everything that was embraced in the section for which it was substituted. The effect of this action of Congress was to repeal Section 7 of the Act of September 19, 1890. 23 Am. & Eng. Ency. of Law, 488; *Ibid.* 512.

It will be noted that the penalty imposed by Section 10 of the Act of 1890 is for violations of *that particular Act*. It is the person, or corporation, "which shall be guilty of creating and continuing any such unlawful obstruction *in this Act* mentioned, or who shall violate the provisions of the last four preceding sections *of this Act*," who is to be deemed guilty of a misdemeanor and punished. For the violation of the *provisions of the Act of 1892 no penalty is imposed*, hence, the acts prohibited are without penal sanction, and the indictment and conviction of the plaintiff in error was without authority of law.

In conclusion, we beg again to remind the Court that the issues in this case are not confined to the question of closing Red Pass only. Numerous passes of like character extend through all the swamp lands granted by Congress in 1849 and 1850 to Louisiana and other States, to be drained and reclaimed; and, if the power be denied to close them, or even if this power be made subject to the arbitrary control of the Secretary of War, the reclaiming of millions of acres of land will be rendered impracticable, if not wholly impossible.

The theory contended for by the prosecution would, if maintained, revolutionize the entire relation of the Federal Government to the State levee, quarantine, inspection, and other authorities, and fill the Federal Courts with the clamors of all those discontented with the administration of police laws. It would seriously embarrass officials charged with the execution of vitally important measures in times of great public danger through flood and pestilence. Indeed, it is hardly an exaggeration to say that the police power is the State, embracing, as it does under

the authorities, the prevention of flood and fire, disease and crime, and all other physical and moral evils. No Federal Statute expressly excepts State officers charged with such duties from criminal punishment for official acts; but, under the authorities, not even the Constitutional Amendments, much less Federal Statutes, were meant to subject to indictment for their official and vitally necessary actions the State's quarantine, fire, inspection, police or levee officials, any more than its officers of justice or the Judges of its Courts.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

ADDENDUM.

By Act of Congress approved March 3, 1899 (Fifty-fifth Congress, Sess. III, Ch. 425, Sec. 9 *et seq.*, p. 1151), the legislation under which this indictment was brought has been greatly changed. Under the proviso at the end of Section 20, actions begun or rights of action accrued prior to the passage of the Act, are not affected thereby. It may be, therefore, that the change is of importance only on account of the inferences that may be drawn from such action as to the meaning and effect of the prior legislation.

It will be noted that the inclusion of this very proviso in the later legislation gives strong support to the argument to be found in the present brief, on pp. 36 and 37, to the effect that Section 7 of the Act of 1890 having been amended and re-enacted by the Act of 1892 (without any saving clause), had been repealed. If a saving clause was necessary in the Act of 1899, was it not necessary in the Act of 1892?

An inference of much wider scope is also legitimately to be drawn from the nature of the change made by the Act of 1899. Sec. 7 of the Act of 1890 forbade the obstruction of navigation "without the permission of the Secretary of War." So also did Sec. 7 of the Act of 1892. It will be seen from the very language of the Acts referred to, that the Secretary of War was not to decide whether any proposed structure would obstruct navigation, and then issue or refuse his permission according to such decision. The plain meaning of the Act was, that any one armed with the permission of the Secretary of War could, without any penalty whatsoever, obstruct navigation to any extent

allowed by that officer. Nor would the Secretary, in issuing a permit for such obstruction, have violated any duty imposed on him by the Act. On the contrary, the meaning was perfectly plain, that he should issue permits for *some* obstructions; although absolutely no ground was even suggested on which he should permit some obstructions and refuse others. There was not even the regulation usual in certain classes of licenses, that he should determine the fitness of the applicant.

Congress has since, by the legislation to which we have above referred, taken away this power. Under the legislation now in force, the power to obstruct must be derived from Congress itself (or from State Legislatures in certain cases).

Under the legislation under which this indictment was brought, it was possible, without incurring the penalties prescribed, to construct a bridge or other works under an Act of a State Legislature, after the plans had been approved by the Secretary of War. But it was also possible for a mere private individual, without incurring any penalties, to construct a dam or any other obstructions simply with the "permission of the Secretary of War." The first power still exists, in certain cases, and was approved by this Honorable Court in Lake Shore & Michigan Railway vs. Ohio, 165 U. S., at p. 368. But the second power, that of "permitting" the making of obstructions without any legislative authority, State or Federal, that decision passes, without deciding. (P. 368). And Congress has since taken the power away.

It is true that the legislation attacked does not in express terms give the Secretary of War unlimited power to

originate dams, bridges and other obstructions, by issuing licenses to private individuals not armed with any legislative authority, State or Federal. But it does give legal force and effect to such permits, so issued, by providing a punishment for the individual not armed with such a permit and allowing such a permit to constitute a perfect protection to him to whom it is issued. Clearly, if Congress could not vest in the Secretary of War the power to issue such permits, it could not make them the basis of discrimination between citizens performing similar acts, or, indeed, endow them with any force whatsoever. This Honorable Court has used emphatic language on this general subject in Yick Wo vs. Hopkins, 118 U. S., at page 370:

"But the fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessing of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth may be '*a government of laws and not of men.*'" (Italics ours).

We have referred to the case of Yick Wo vs. Hopkins, because we conceive that it clearly decides that penalties may not be made to hinge upon the existence of illegal permits. We conceive that it further decides that our government, State or Federal, cannot be a government by mere "permission." The decision rested upon the XIV Amendment. Our present contention may well rest upon Amendment V, upon the Preamble to the Constitution, and upon the division of the government into its respective branches.

It will be remembered that the defendant in this case

was not indicted for constructing a bridge or other works under a legislative act of the State, without having the plans approved by the Secretary of War. That was neither the theory of the prosecution nor the language of the indictment. He was indicted for having made a dam without the "permission" of the Secretary of War. The case against him must, therefore, rest on the portion of the Act which we have attacked. It does not, therefore, rest upon the portion approved in Lake Shore vs. Michigan (*supra*) but upon a part of the law resting upon a question which that opinion expressly passed without deciding. It has been held proper legislation to require the Secretary of War to approve plans for work having legislative authorization. But to authorize him, in the exercise of arbitrary power, to "permit" private citizens to dam rivers is a very different matter. And to make such permits, if issued, the final guide as to punishment or impunity of course requires as much constitutional authority as to directly authorize them.

It is with great diffidence that we question the constitutionality of an Act of Congress. But the Act in question was novel in federal legislation, a century having passed without a similar Act. Its language is confused; it has been twice amended; and this Honorable Court in the case referred to above passed without deciding what we conceive to be practically the very point we now urge. And since that time the objectionable feature has been eliminated by Congress itself. If our contention be correct, it is plain, upon the face of the record, that there was no constitutional law (and, therefore, no law at all) forbidding the act charged in the indictment, and no penalty imposed by law therefor;

and the record when considered under the light of the Constitution could not justify the conviction or punishment of the defendant. So far as the present case is concerned, the effect of such a decision would simply be to prevent the punishment of a defendant performing an official act, justified by an unanimous decision of his State Supreme Court, saving his Parish from disaster, and found by the jury, under the charge, to interfere with a theoretically possible but practically non-existent commerce from other States with the borders of the bayou; an act never questioned until long afterwards. So far as the general effect of such a decision is concerned, it would simply hold that the legislative status from 1890 to 1899 was the same as that for a century previous. But we submit, that to maintain the constitutionality of the clause that has been repealed, would form an exceedingly dangerous and far-reaching precedent. The principles on which we rely underlie all the powers of the government.

Respectfully submitted,

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